

Durham Research Online

Deposited in DRO:

09 September 2021

Version of attached file:

Published Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Kagiaros, Dimitrios (2021) 'Reassessing the Framework for the Protection of Civil Servant Whistleblowers in the European Court of Human Rights.', *Netherlands Quarterly of Human Rights*, 39 (3). pp. 220-240.

Further information on publisher's website:

<https://doi.org/10.1177/09240519211044955>

Publisher's copyright statement:

This article is distributed under the terms of the Creative Commons Attribution 4.0 License (<https://creativecommons.org/licenses/by/4.0/>) which permits any use, reproduction and distribution of the work without further permission provided the original work is attributed as specified on the SAGE and Open Access page (<https://us.sagepub.com/en-us/nam/open-access-at-sage>).

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.



Reassessing the framework for the protection of civil servant whistleblowers in the European Court of human rights

Dimitrios Kagiarnos 

School of Law, Durham University Durham, UK

Abstract

The European Court of Human Rights (ECtHR or Court) has included civil servant whistleblowers in the protective ambit of Article 10 of the European Convention on Human Rights. The article argues that the Court should revisit its approach to proportionality in such cases. When determining whether a restriction to a civil servant whistleblower's free speech was necessary in a democratic society, the Court weighs what the article identifies as the quasi-public watchdog function of whistleblowers (namely their role in imparting information on matters of public concern) against their duties and responsibilities as civil servants. In some instances, the Court gives primacy to whistleblowers' duties of loyalty to the government over their contribution to the accountability of public bodies. The article challenges this approach on the basis that it fails to adequately consider the key justification that underpins the Court's recognition of whistleblowing as speech, namely the audience interest in receiving the information the whistleblower discloses. The article argues that the Court should give primacy to the watchdog function of whistleblowers. It concludes by making suggestions on how the ECtHR can adopt a more principled approach to proportionality in whistleblowing cases.

Keywords

Freedom of expression, Article 10 ECHR, whistleblowers, public interest disclosures, proportionality

Corresponding author:

Dimitrios Kagiarnos, Durham University Law School, Palatine Centre, Durham, DH1 3LE, UK.

Email: dimitrios.kagiarnos@durham.ac.uk

I. INTRODUCTION

Whistleblowing is increasingly understood as a necessary safeguard against corruption and a crucial component of good governance.¹ Both the European Union (EU) and the Council of Europe (CoE) have prompted their respective Member States to adopt robust whistleblower protection frameworks,² in recognition of the fact that ‘whistleblowers play an essential role in any open and transparent democracy’.³ For the CoE, the existence of effective safeguards at the domestic level protecting whistleblowers from retaliation constitutes ‘a genuine democracy indicator’.⁴ Protections for whistleblowers are also a matter of fundamental rights. The European Court of Human Rights (ECtHR or Court) has held that employment-related sanctions or criminal prosecutions⁵ against whistleblowers for disclosing public interest information can violate freedom of expression.⁶ Whistleblowing is thus viewed as a form of expression that attracts protection under Article 10 of the European Convention on Human Rights (ECHR or Convention), the Convention’s free speech provision.⁷ Accordingly, due to the qualified nature of Article 10 ECHR, any detriment to which a whistleblower is exposed for bringing attention to organisational misconduct must satisfy the test of proportionality in order to comply with the Convention.

The manner in which the Court carries out the proportionality test in cases relating to civil servant whistleblowers is the focus of this article. The Court recognises that civil servants are in many cases best placed to act in the public interest by sharing vital information on government wrongdoing.⁸ The Court, however, also acknowledges the interest in preserving State secrecy⁹ and the fact that civil servants must ‘help and not hinder’¹⁰ the democratically elected government of the day. Civil servants are thus bound by heightened duties of loyalty, discretion and moderation towards their institution.¹¹ In the final stage of its proportionality analysis,¹² the Court weighs these

-
1. The Parliamentary Assembly of the Council of Europe suggests that ‘the term whistle-blower must be broadly defined so as to cover any individual or legal entity that reveals or reports, in good faith, a crime or lesser offence, a breach of the law or a threat or harm to the public interest of which they have become aware either directly or indirectly’, see Council of Europe Parliamentary Assembly Resolution 2300: Improving the protection of whistle-blowers all over Europe (1 October 2019) para 5.
 2. See Council of Europe Parliamentary Assembly (n 1) and Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (2019) OJ L305/17.
 3. Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report by Rapporteur Sylvain Waserman of 16 March 2018. For a discussion on the contribution of whistleblowers to transparency more broadly, see also Inger Høedt-Rasmussen and Dirk Voorhoof, ‘Whistleblowing for Sustainable Democracy’ (2018) 36 *Netherlands Quarterly of Human Rights* 3.
 4. Council of Europe Parliamentary Assembly (n 1) para 1.
 5. For an overview of the retaliation that whistleblowers face see Fred Alford, *Whistleblowers: Broken Lives and Organizational Power* (Cornell University Press 2001).
 6. See *Guja v Moldova* App No 14277/04 (ECHR, 12 February 2008).
 7. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) Article 10.
 8. *Guja v Moldova* (n 6) para 72.
 9. *ibid* para 71. From the Court’s broader case law, see also *Stoll v Switzerland* App No 69698/01 (ECHR, 10 December 2007) para 155.
 10. *Guja v Moldova* (n 6) para 71.
 11. *ibid*.
 12. The Court’s approach to proportionality is highly contested, particularly by scholars who subscribe to a ‘rights as trumps’ understanding of rights, most commonly associated with Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977). For an overview of these critiques from the perspective of Article 10 ECHR see Stavros

competing considerations to assess whether the restriction to the whistleblower's speech will amount to a violation of Article 10 ECHR. More specifically, when determining whether the interference was necessary in a democratic society, and regardless of the legitimate aim for the interference, the Court reaches its conclusion by reference to the following six criteria:

1. whether the whistleblower used more discreet means of remedying the wrongdoing before proceeding to a public disclosure of information to the press;
2. the public interest in the disclosed information;
3. the accuracy of the disclosed information;
4. whether the public interest in the information outweighs any damage caused to the public authority by the unauthorised disclosure;
5. whether the motives of the whistleblower were pure rather than self-serving; and
6. the severity of the penalty imposed on the whistleblower.¹³

The Court has relied on these criteria throughout its whistleblower case law, thus providing us with insight into how they apply in practice. There is, however, a paucity of research that assesses whether this is a principled way to determine the proportionality of any interference with whistleblowers' freedom of expression. This is a pressing question considering that States are increasingly encouraged to adopt effective whistleblower protection frameworks, which conform to best practice standards at the international level.¹⁴ It is, therefore, vital to revisit these criteria, and assess their application across the ECtHR's whistleblower case law, in order to ensure that its approach to whistleblowing is principled and coherent.

In order to carry out this assessment, this study first establishes the standard against which these criteria will be evaluated. Thus far, most commentators have adopted a strong normative position in favour of public interest whistleblowing and assessed any whistleblower protection framework based on its capacity to provide the whistleblower with meaningful safeguards against victimisation.¹⁵ This study adopts a different benchmark. The article evaluates these criteria based on their conformity with the principles underpinning freedom of expression, as this right is understood in the context of the ECHR. Therefore, in order to assess these criteria, Section 2 identifies the key principle or justification on which the ECtHR relies to conclude that whistleblowing counts as expression protected under Article 10 ECHR. This section argues that whistleblowing is an example of speech where the Court offers protection out of concern for the *audience interest* in hearing the speech, rather than the speaker's right to say what they wish. Sections 3 and 4 assess whether the criteria, and the manner in which the Court has applied them in its

Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2009) 7(3) International Journal of Constitutional Law 468-493.

13. These were first established in *Guja v Moldova* (n 6) paras 73-78.

14. See Council of Europe Parliamentary Assembly (n 2).

15. Indicatively Hunt-Matthes and Motarjemi, 'How to Make Whistleblower Protection in Europe more Effective' (*Verfassungsblog*, 18 August 2020) <<https://verfassungsblog.de/how-to-make-whistleblower-protection-in-europe-more-effective/>> accessed on 3 July 2021; David Lewis, 'The Council of Europe Resolution and Recommendation on the Protection of Whistleblowers' (2010) 39(4) Industrial Law Journal 432; Lewis and Fasterling, 'Leaks, Legislation and Freedom of Speech: How Can the Law Effectively Promote Public Interest Whistleblowing' (2014) 153(1) International Labour Review 71; John Bowers et al, *Whistleblowing: Law and Practice* (Oxford University Press 2012) para 11.140; Dirk Voorhoof, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a More Transparent Democratic Society* (European University Institute 2014).

proportionality assessment, are in line with this justification. A distinction is drawn between criteria that focus on the content of the disclosure (discussed in Section 3), and criteria that focus on the worker-based duties of the whistleblower (discussed in Section 4). The article concludes that the former are in line with the justifications for recognising whistleblowing as speech, but raises doubts in relation to some of the latter. More specifically, the article argues that some of the criteria that the Court has drawn from its broader case law on workplace speech may not be well suited to the specific attributes of whistleblowers as speakers. Section 5 develops a normative argument, namely that to make this framework more principled, the Court must bolster what the article identifies as the quasi-public watchdog function of whistleblowers against their duties as workers. Section 6 then addresses potential counterarguments to this position, while Section 7 provides a conclusion to the article.

2. WHY WHISTLEBLOWING ENGAGES ARTICLE 10 ECHR

2.1 DEMOCRACY-BASED JUSTIFICATIONS FOR SPEECH AND THE AUDIENCE INTEREST

This section addresses two preliminary theoretical points. The first is more general and focuses on the Court's understanding of freedom of expression. It concludes that a democracy-based argument for free speech best describes the ECtHR's approach in its Article 10 ECHR case law. The second point is more specific to whistleblowing as a form of expression. This section argues that the audience interest in the disclosed information is the driving force that leads the Court to recognise that 'blowing the whistle' on organisational misconduct is an activity that engages Article 10 ECHR. These two points serve as the basis for the critique of the Court's approach to proportionality in whistleblowing cases.

As to the first point, there have been various attempts to provide a principled account of why freedom of expression is a value worth protecting in the law. One theory contends that the unimpeded circulation of information and ideas leads to the discovery of truth.¹⁶ According to this view, the attainment of truth requires all opinions and ideas to circulate freely, without State interference, and to compete in a metaphorical marketplace of ideas.¹⁷ This competition of ideas ensures that 'wrong opinions and practices gradually yield to fact'.¹⁸ For this reason, marketplace of ideas theorists treat any State restrictions to speech with suspicion as they may obstruct the proper functioning of the marketplace and, consequently, the discovery of truth. Other scholars focus on free speech as an exercise in individual autonomy.¹⁹ They view speech as a means for achieving the self-development and self-actualisation of the speaker.²⁰ For proponents of this approach, government suppression of speech has the effect of inhibiting 'our personality and its growth'.²¹ The argument from suspicion of government is another justification commonly deployed to underscore the importance of freedom of expression.²² The underlying assumption here is that those in power are

16. See John Stuart Mill, *On Liberty and Other Essays* (Roberts, Green, 1864).

17. *ibid* 21.

18. *ibid*.

19. See Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1(2) *Philosophy & Public Affairs* 204, especially 215-219.

20. See C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press 1989).

21. See Eric Barendt, *Freedom of Speech* (Oxford University Press 2007) 13.

22. See Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press 1982) 86.

likely to attempt to suppress dissent. Robust protections for freedom of expression serve to mitigate this risk.

The final and most relevant argument for the purposes of the article is the view that free speech is a prerequisite for, and a key component of, a well-functioning democracy.²³ Meiklejohn, the main proponent of this theory, argues that representative self-government requires citizens to have access to all available information in order to formulate opinions and to participate effectively in democratic decision-making.²⁴ Thus, freedom of speech plays a vital role in facilitating and guaranteeing meaningful democratic deliberation.

There are many criticisms of this theory. A democracy-based justification for speech can be faulted for failing to view speech as intrinsically important.²⁵ Moreover, the narrow focus on speech that contributes to democratic deliberation may create artificial hierarchies of speech, and disadvantage forms of expression that do not *prima facie* contribute to democracy.²⁶ In spite of these concerns, this understanding of free speech has been central to the ECtHR's interpretation of Article 10 ECHR. In its landmark judgment in *Handyside v United Kingdom*,²⁷ the Court stressed that freedom of expression is 'one of the essential foundations of a democratic society, one of the basic conditions for its progress'.²⁸

The Court's approach to whistleblowing reflects this understanding of freedom of expression. In *Guja v Moldova* the Court recognised that civil servant whistleblowers offer valuable insight into government wrongdoing,²⁹ thus allowing the public to better scrutinise public institutions.³⁰ The Court stressed that public and media scrutiny of government are key elements of any democratic system.³¹ Therefore, the Court views whistleblowing as an asset to democratic deliberation on the basis that it assists the public in getting accurate information on how they are governed.³²

The second theoretical point relates to whether speech is protected in the law out of concern for the interests of the speaker, or to serve the interests of the audience, namely the recipient of the speech. A democracy-based understanding of free speech accommodates both speaker and audience interests.³³ From the perspective of the individual speaker, protection for free speech ensures that she can actively contribute to public discourse and thus meaningfully participate in democratic deliberation. From the perspective of the (more passive) audience as the recipient of a communication, free speech ensures that everyone is exposed to a broad range of views and information, which in turn allows them to make informed political decisions.³⁴ These two dimensions

23. Alexander Meiklejohn, *Free Speech and Its Relation of Self-Government* (Harper 1948).

24. *ibid* and Alexander Meiklejohn, 'The First Amendment is Absolute' (1961) *Supreme Court Review* 245.

25. For this criticism see Alexander who challenges the distinction between high-level and low-level speech in Larry Alexander, 'Free Speech and Speaker's Intent' (1995) 12(21) *Constitutional Commentary* 21.

26. *ibid*.

27. *Handyside v United Kingdom* App No 5493/72 (ECHR, 7 December 1976).

28. *ibid* para 49.

29. See *Guja v Moldova* (n 6).

30. *ibid* para 74.

31. *ibid*.

32. That is not to say that the other free speech theories cannot accommodate whistleblowing. See Ashley Savage, *Leaks, Whistleblowing and the Public Interest: The Law of Unauthorised Disclosures* (Edward Elgar 2016) 7-23.

33. Jacob Rowbottom, 'In the Shadow of the Big Media: Freedom of Expression, Participation and the Production of Knowledge Online' (2014) *Public Law* 491, 495.

34. *ibid*. See also Joseph Raz, 'Freedom of Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303, 308.

are not mutually exclusive. The protection of certain speech can rely on both speaker-based and audience-based justifications.³⁵

Assessing whether primacy should be given to the speaker or the audience becomes more complex when one considers the civil servant or worker status of the whistleblower. The Court has held that protections for freedom of expression apply at work and individuals do not altogether waive their right to freedom of expression when entering into an employment contract.³⁶ However, the Court has also emphasised that civil servants owe heightened duties of loyalty and confidence to their institution as well as a duty of moderation.³⁷ Recently, considerable controversy has surrounded the appropriate role for freedom of expression in instances where workers face employment-related sanctions for posting offensive opinions on their social media.³⁸ In assessing the role of freedom of expression in this context, scholars have placed the emphasis on the speaker's interests to explain why such speech may be worthy of protection.³⁹

It is difficult to reach the same conclusion where whistleblowing is concerned. As Barendt contends, basing free speech protection for unauthorised disclosures made in breach of secrecy laws on 'a civil servant's interest in disclosing the contents of government files, is much less attractive'.⁴⁰ According to Barendt, the civil servant who discloses information can only be afforded a 'parasitic' free speech claim,⁴¹ as in this instance free speech protection is directed towards the recipient of the information, the audience. Under this understanding, the whistleblower's right to speak is not self-standing, but derives from the audience's interest in accessing the disclosed information.⁴²

Barendt's view on whistleblowing is not uniformly accepted. Baker, for instance, has attempted to reconcile whistleblowing with personal autonomy theories of freedom of expression.⁴³ For Baker, whistleblowing is an attempt to halt corruption and illegal activity in an organisation in order to ensure that it pursues the values the whistleblower holds.⁴⁴ Thus, he contends that whistleblowing 'involves using speech directly to make the world correspond to the speaker's substantive values'.⁴⁵

35. Rowbottom (n 33) 495.

36. *Vogt v Germany* App No 17851/91 (ECHR, 26 September 1995) para 53 and Lucy Vickers, *Freedom of Speech and Employment* (Oxford University Press 2002) especially chapter 3.

37. These duties and their impact on the protection the whistleblower receives under Article 10 ECHR will be discussed in detail in subsequent sections.

38. See Paul Wragg, 'Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle' (2015) 44 *Industrial Law Journal* 1 and Virginia Mantouvalou, "'I Lost my Job Over a Facebook Post – Was that Fair?' Discipline and Dismissal for Social Media Activity' (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations* 101.

39. *Ibid.*

40. Barendt (n 21) 25.

41. *ibid.* 195.

42. For criticism of this approach see Eric R. Boot, 'No Right to Classified Public Whistleblowing' (2018) 31 *Ratio Juris* 70.

43. Baker (n 20) 61.

44. *ibid.*

45. *ibid.* A distinction has been drawn between 'watchdog' and 'protest' whistleblowing. Watchdog whistleblowing involves the disclosure of information that demonstrates misconduct or illegal behaviour. Protest whistleblowing describes instances where the 'whistleblower objects to a lawful or transparent activity of his employer' see Wim Vandekerckhove, *Whistleblowing and Organizational Social Responsibility: A Global Assessment* (Ashgate 2006) 215. By focusing on wrongdoing, the ECtHR framework relates to watchdog whistleblowing. See *Herbai v Hungary* App No 11608/15 (ECHR, 5 November 2019) para 40.

2.2 THE STANCE OF THE ECtHR AND THE EFFECT ON PROPORTIONALITY

The ECtHR's stance on whistleblowing seems to be much closer to Barendt's rather than Baker's view. In determining whether whistleblowing is an activity that engages Article 10 ECHR, the Court held that

a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgence or publication corresponds to a *strong public interest*. [...] This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed *to act in the public interest* by alerting the employer or the *public at large*.⁴⁶

Thus, the Court justifies the inclusion of whistleblowing in the ambit of Article 10 through recourse to the public's interest in accessing the information, rather than the civil servant's right to exercise her individual autonomy by blowing the whistle on misconduct.

Placing the emphasis on the speaker's or the audience's interests has important consequences for proportionality review. As Vickers argues, a worker basing her free speech claim on her individual autonomy to disclose confidential information must confront the individual interest of her employer in keeping the information secret.⁴⁷ There is a danger that if these two competing interests are balanced, they may cancel out each other.⁴⁸ Vickers rightly contends that where the audience interest is at play, 'the right of the employer is weighed against the rights of the employee and the audience, with the result that the right to speak is much more likely to prevail'.⁴⁹ When this audience interest is examined under the prism of a democracy-based justification for speech, the significance of protecting a communication that contributes to democratic deliberation is all the more obvious. Unlike cases where the individual speaker's interest to share her opinion is subject to public interest limitations, where whistleblowing is concerned, it is the audience's right to receive the information that serves as the key interest Article 10 protects. Therefore, any criteria the Court establishes must be assessed in a manner that ensures that this primary interest is not unduly circumscribed.

With this in mind, the paper turns to assessing the criteria at issue. Regardless of the legitimate aim for the restriction to Article 10 ECHR in the specific case,⁵⁰ the Court relies on the same aforementioned criteria in its whistleblowing case law when assessing whether a restriction is necessary in a democratic society.⁵¹ In order to assess these criteria, the following sections introduce a distinction between criteria that focus on the message the whistleblower conveys, and those that emanate from the whistleblower's duties as a worker. As the following section argues, criteria that ensure the accuracy of, and the public interest in, the disclosed information further support the telos of whistleblower protection in the ECHR framework. Conversely, criteria that do not focus on the information the whistleblower communicates require further scrutiny. For this latter category, the

46. *Guja v Moldova* (n 6) para 72 (emphasis added).

47. Vickers (n 36) 20.

48. *ibid.*

49. *ibid.*

50. In some cases, the legitimate aim was the prevention of the disclosure of information received in confidence (*Guja v Moldova* (n 6) para 59 and *Matúz v Hungary* App No 73571/10 (ECHR, 21 October 2014) para 30), in other cases the aim was to protect national security (*Bucur and Toma v Romania* App No 40238/02 (ECHR, 8 January 2013) para 83) or the rights of others (*Heinisch v Germany* App No 28274/08 (ECHR, 21 July 2011) para 49).

51. See for instance cases cited in n 50.

article expresses some scepticism as to whether the Court deploys them in its proportionality assessment in a principled manner.

3. CRITERIA THAT FOCUS ON THE CONTENT OF THE DISCLOSURE

The Court notes that '[p]articular attention shall be paid to the public interest involved in the disclosed information'.⁵² Additionally, the Court creates a duty on whistleblowers by stating that '[a]ny person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable'.⁵³ After examining these two criteria in turn, this section concludes that they implicitly assign the whistleblower a quasi-public watchdog and quasi-journalist status. They serve as a means for the Court to test the value or the significance of the information that reaches the whistleblower's audience. On this basis, they are in line with the justification for recognising whistleblowing as speech, as they focus on the audience interest in the information.

3.1 THE PUBLIC INTEREST IN THE DISCLOSURE AND THE VERACITY OF THE INFORMATION THE WHISTLEBLOWER SHARES

The Court in *Guja* held that while political accountability of government to the legislature and legal accountability to the courts is vital for a functioning democracy, the government should also be subject to scrutiny by 'the media and public opinion'.⁵⁴ The Court acknowledged that 'the interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence'.⁵⁵ This form of judicial balancing to determine whether a disclosure is in the public interest has been the subject of criticism, especially where State secrets and national security are concerned.⁵⁶ The Court, however, has not demonstrated any notable restraint in carrying out such assessments in its whistleblowing case law, even where disclosures relate to matters of national security.⁵⁷ This assessment is carried out on an *ad hoc* basis,

52. *Guja v Moldova* (n 6) para 74.

53. *ibid* para 75. Protection is not afforded to defamatory, baseless accusations or accusations formulated in bad faith. See *Castells v Spain* App No 11798/85 (ECHR, 23 April 1992) para 46.

54. *Guja v Moldova* (n 6) para 74.

55. *ibid*.

56. For an analysis of judges' approaches to national security see Hitoshi Nasu, 'State Secrets Law and National Security' (2015) 64 *International and Comparative Law Quarterly* 365, especially 400 and further. On balancing free speech and national security whistleblowing see Dimitrios Kagiarios, 'Protecting 'National Security' Whistleblowers in the Council of Europe: an Evaluation of Three Approaches on How to Balance National Security with Freedom of Expression' (2015) 19 *International Journal of Human Rights* 408 and Ioannis Kampourakis, 'Protecting National Security Whistleblowers in the U.S. and in the ECtHR: The Limits of Balancing and the Social Value of Public Disclosures' (April 2020), online SSRN database: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576036> accessed on 3 July 2021. The CoE through Parliamentary Assembly Resolution 1954 on National Security and Access to Information, 2 October 2013, endorsed the 'Tshwane Principles' that set out how national security and the right to access information can be balanced, see Open Society Foundations, *The Global Principles on National Security and the Right to Information*, 12 June 2013 (Tshwane Principles). On national security whistleblowers also see Resolution 2060 (2015) on Improving the Protection of Whistle-blowers, 23 June 2015.

57. *Bucur and Toma v Romania* (n 50).

and the ECtHR's approach does not differ from other free speech cases where the Court is called to determine the public interest in a specific communication. More specifically, the Court reiterates the significance of political speech and the importance of 'open discussion of topics of public concern'.⁵⁸ The Court stresses this 'is essential to democracy, and regard must be had to the great importance of not discouraging members of the public from voicing their opinions on such matters'.⁵⁹ Consequently, the Court grants only a narrow margin of appreciation when restricting such speech.⁶⁰ In the Court's civil servant whistleblowing case law, it has identified a strong public interest in making public information relating to political interference into the work of investigation authorities;⁶¹ unlawful surveillance carried out by the intelligence services;⁶² and the editing of programmes on State television.⁶³

The other message-focused criterion on which the Court relies is the veracity of the disclosed information. The Court examines whether the whistleblower did all that was reasonably expected of them under the circumstances,⁶⁴ to confirm that the information they are disclosing is factually accurate. Thus, public allegations of misconduct that are based on 'a mere rumour'⁶⁵ without 'supporting evidence'⁶⁶ cast doubt over the whistleblower's good faith and by extension the protection they receive under Article 10 ECHR.

3.2 ASSESSMENT OF THE CRITERIA FROM THE PERSPECTIVE OF FREEDOM OF EXPRESSION: WHISTLEBLOWERS AS QUASI-JOURNALISTS AND PUBLIC WATCHDOGS

The Court primarily relied on its own case law when developing its framework for whistleblower protection. More specifically, the Court primarily draws both these criteria from its case law on the protection of journalism.⁶⁷ The Court has long held that journalists and the press serve as 'public watchdogs'⁶⁸ due to their key function in a democratic society, namely to provide information on matters of public concern.⁶⁹ By relying on its case law on press freedoms and by acknowledging that whistleblowers are another avenue for such information to reach the audience, the Court implicitly recognises that whistleblowing also entails an element of acting as a public watchdog. Similarly, the requirement to confirm the veracity of the disclosed information is drawn from the Court's case law on the duties and responsibilities of journalists under Article 10 ECHR to

58. *Guja v Moldova* (n 6) para 91.

59. *ibid.*

60. *ibid* para 74.

61. *ibid* para 86.

62. *Bucur and Toma v Romania* (n 50).

63. *Matúz v. Hungary* (n 50) para 33.

64. *Rungainis v Latvia* App No 40597/08 (ECHR, 14 June 2018) para 57. This is broadly in line with the Council of Europe's Parliamentary Assembly Resolution 1729 on the Protection of Whistle-Blowers, 29 April 2010, para 6.2.4.

65. *Soares v Portugal* App No 79972/12 (ECHR, 21 June 2016) para 46.

66. *ibid.*

67. The Court cites *Fressoz and Roire v France* App No 29183/95 (ECHR, 21 January 1999) and *Radio Twist, A.S. v Slovakia* App No 62202/00 (ECHR, 19 December 2006). The Court relies on these cases to argue that acts or omissions of the government must be subject to media and public scrutiny and concludes that States enjoy a narrow margin of appreciation 'for restrictions on debate on questions of public interest'. The Court also cites *Süreç v Turkey (no. 1)* App No 26682/95 (ECHR, 8 July 1999).

68. *Lingens v Austria* App No 9815/82 (ECHR, 8 July 1986) para 44.

69. See indicatively *Cumpănă and Mazăre v Romania* App No 33348/96 (ECHR, 17 December 2004) para 93.

communicate accurate and reliable information.⁷⁰ The Court thus draws a parallel between journalists and whistleblowers and assigns the latter some of the duties and responsibilities of the former, through the expectation to corroborate, to the extent that is possible, the authenticity of the disclosed information. Thus, whistleblowers are also expected to act as quasi-journalists before alerting the public to misconduct within a public authority.

These two criteria enable the Court to carry out an assessment of the content of the message that reaches the whistleblower's audience. More specifically, the Court examines the quality of this message to ensure that it conforms to the standards that best serve the broader public. In this context, the Court provides free speech protection only to whistleblowers whose disclosure meets the standards that benefit the audience the most. The criteria relate to the audience's interest in being exposed to information that is important and accurate, so that they can in turn better scrutinise government (mis)conduct. Consequently, these two criteria are fully in line with the underlying rationale behind recognising whistleblowing as speech, as the Court seeks to enhance the quality of the speech and to ensure that it only protects speech that is 'worth hearing'.⁷¹

In its assessment of the remaining criteria, however, the Court moves away from the content of the disclosure and is concerned with the duties inherent on the position of whistleblowers as civil servants. These will be examined in the following section.

4. CRITERIA THAT DO NOT FOCUS ON THE PUBLIC INTEREST VALUE OF THE MESSAGE

4.1 THE DETRIMENT CAUSED TO THE PUBLIC AUTHORITY BY THE DISCLOSURE

The Court next weighs the benefit from any disclosure against the harm it causes to the public body against which the whistle was blown.⁷² An overview of whistleblowing case law reveals that the Court has primarily focused on three interests which a civil servant prejudices by reporting wrongdoing. First, a disclosure of wrongdoing may undermine trust in a public institution. Second, it may prejudice a public body's economic and commercial interests. Third, it may undermine the authority of certain individuals within the whistleblower's institution. This section examines in turn how the Court has weighed these countervailing interests against the public interest in the disclosure.

First, the Court identifies an interest in maintaining public trust and confidence in a public institution. A disclosure of misconduct may weaken this trust.⁷³ Faith in public institutions is a concern the Court has dealt with in its broader Article 10 ECHR case law, singling out the reputation of the judiciary as particularly important to protect. This is because judges 'are subject to a duty of discretion that precludes them from replying' to any attacks or criticism.⁷⁴ Thus, restrictions on criticism of the judiciary can apply under Article 10 on the basis that the court system 'must enjoy public confidence if it is to be successful in carrying out its duties'.⁷⁵ This, however, applies in

70. *Guja* references *Bladet, Tromsø and Stensaas v Norway* App No 21980/93 (ECHR, 20 May 1999) para 59 for this criterion. In relation to the veracity of the information the Court also references *Morissens v Belgium* App No 11389/85 (ECmHR, 3 May 1988).

71. See Schauer (n 22) 158 and further.

72. *Guja v Moldova* (n 6) para 76.

73. *Guja v Moldova* (n 6) para 90.

74. *Prager and Oberschlick v Austria* App No 15974/90 (ECHR, 26 April 1995) para 34.

75. *Kudeshkina v Russia* App No 29492/05 (ECHR, 26 February 2009) para 86.

relation to ‘destructive attacks which are essentially unfounded’ against the judiciary rather than disclosures in the public interest.⁷⁶ Where the latter are concerned, the Court has confirmed that ‘questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10’,⁷⁷ as do issues relating to the separation of powers.⁷⁸

Overall, when assessing the reputational harm that the public institution suffered, the Court has been generous towards whistleblowers if their disclosure related to a matter of public interest. In *Guja* for instance, the Court noted that ‘the public interest to maintain confidence in the independence and political neutrality of the prosecuting authorities of a State’ was worthy of protection.⁷⁹ This interest, however, was outweighed by the public interest in the disclosure of wrongdoing, a conclusion the Court reached categorically, namely without providing an in-depth account as to how these two competing interests should be weighed against each other.⁸⁰ Similarly, in *Bucur and Toma v Romania*,⁸¹ a case relating to unauthorised disclosures by a member of the Romanian security service, the Court acknowledged the interest in maintaining public confidence in the intelligence community, but stressed that the competing public interest in the disclosure of information regarding illegal activity in a State-run body was more important.⁸²

Second, the Court recognises that an unauthorised disclosure may also affect a public body’s economic or commercial interests. In the case of *Heinisch v Germany*, the Court examined the allegations of a nurse against a majority State-owned nursing home.⁸³ The Court noted that the ‘interest in protecting the commercial success and viability of companies’ also applied to State-owned companies.⁸⁴ It concluded, however, that

the public interest in receiving information about shortcomings in the provision of institutional care for the elderly by a State-owned company is so important in a democratic society that it outweighs the interest in protecting the latter’s business reputation and interests.⁸⁵

The balancing here is, once again, carried out in a nearly automatic manner, as the Court does not go into great depth or provide any normative justifications as to why the interest in disclosure overrides the commercial interests of the institution. The Court considers it almost axiomatic that the audience (public) interest in the disclosure outweighs commercial or economic concerns.

Third, the Court may consider the general effect the disclosure will have on the authority of individuals within their institution. The Court focused on this interest in its judgment in *Langner v Germany*, a case where a municipal worker was dismissed for accusing a deputy mayor of misconduct during a heated exchange in a staff meeting and a strongly worded letter to his superior.⁸⁶ The

76. *ibid.*

77. *Baka v Hungary* App No 20261/12 (ECHR, 23 June 2016) para 165.

78. *ibid.* See also *Guja v Moldova* (n 6) para 88. On this point, see also the more recent judgment in *Kövesi v Romania* App No 3594/19 (ECHR, 5 May 2020) para 209.

79. *Guja v Moldova* (n 6) para 90.

80. *ibid* para 91.

81. *Bucur and Toma v Romania* (n 50).

82. *ibid* para 115.

83. *Heinisch v Germany* (n 50).

84. *ibid* para 89.

85. *ibid* para 90.

86. *Langner v Germany* App No 14464/11 (ECHR, 17 September 2015).

Court distinguished this case from its whistleblowing case law, as the applicant did not satisfy multiple criteria for protection under Article 10 ECHR.⁸⁷ In relation to this criterion, the Court endorsed the domestic courts' finding that the impact of the impugned statements were likely to have an adverse effect on the reputation of the deputy mayor and 'interfere seriously with the working atmosphere' within the institution.⁸⁸ This meant that dismissal was a proportionate restriction to the applicant's free speech. Here, however, the Court had already determined that the disclosure did not amount to public interest whistleblowing. Consequently, it did not provide insight as to how it would weigh the public interest in the disclosed information against this specific type of detriment to the institution where the applicant was assigned whistleblower status.

If the public interest in the speech is expected to almost certainly override any conflicting reputational or economic harm caused to a public authority by the unauthorised disclosure as the aforementioned judgments have demonstrated, then the inclusion in proportionality of this criterion should be abandoned. Where the whistleblower has satisfied the first two criteria, the inclusion of this criterion only muddies the waters as to how to carry out the proportionality test, particularly considering how it may affect domestic whistleblower protection frameworks that Contracting Parties to the ECHR adopt. If the Court establishes that the disclosure is accurate and in the public interest, there is no principled reason for this interest to be the subject of an additional balancing exercise, in order to protect the reputation or other interests of a public authority that has been involved in misconduct.

This criterion would be more useful in other instances of workplace speech, where the speaker discloses information that is trivial (namely information not deemed to be in the public interest), or where a civil servant's speech amounts to an unwarranted attack against their institution. In such cases, where the audience interest is not the Court's primary concern, it may be relevant for the purposes of proportionality to assess the harm caused to the institution by the disputed speech before penalising the speaker. On this basis, the Court could more explicitly assign this criterion an auxiliary role, whereby it is only 'triggered' in cases where the Court finds that the whistleblower's disclosure did not relate to a matter of public interest, or where the actions of the civil servant speaker did not amount to whistleblowing. By introducing this criterion in its whistleblowing case law, the Court fails to draw a clear distinction between public interest whistleblowing and other types of workplace speech. The considerations for proportionality should be different depending on how important the speech is for the recipient audience.

4.2 THE WHISTLEBLOWER'S MOTIVES

With its next criterion, the Court turns to an examination of the motives that led the whistleblower to alert the public to the authority's misconduct. Whistleblowers are usually portrayed as individuals who have particularly strong values that compel them to speak out against wrongdoing. However, whistleblowers may be driven by less honourable reasons for disclosing information. For instance, they may want to harm their institution, especially in cases where they perceive themselves as victims of mistreatment in the workplace.⁸⁹ In such cases, the whistleblower is less

87. This will be discussed in more detail below.

88. *Langner v. Germany* (n 86) para 51.

89. Gobert and Punch, 'Whistleblowers, the public interest and the Public Interest Disclosure Act 1998' (2000) 63 *Modern Law Review* 25, 31.

interested in bringing about institutional reform or addressing wrongdoing and may disclose information for self-serving reasons. As Gobert and Punch argue, in many cases ‘the motivation driving whistleblowers may be mischievous, malevolent or even near pathological’.⁹⁰ According to their analysis, whistleblowers may use unauthorised disclosures to protect themselves from ‘legitimate criticism, pending disciplinary proceedings or a threatened termination of employment’, rather than informing the public interest.⁹¹

In light of this, it is important to consider whether an examination of whistleblowers’ motives should feature in the Court’s analysis. In *Guja*, the Court answered this question in the affirmative.⁹² It noted that a disclosure ‘motivated by a personal grievance or a personal antagonism or the expectation of personal advantage, including pecuniary gain, would not justify a particularly strong level of protection’.⁹³

In most cases, the Court has found whistleblowers’ motives to be pure. In the few cases where the motives of the whistleblower were at issue, the Court has adopted inconsistent positions as to the significance this will have for the outcome of the case. In some cases, the ECtHR weighs the potential self-serving motives of the applicant against the interest in the disclosure, and finds that the latter was more important.⁹⁴ In other judgments, however, the Court adopts a stricter stance. In the *Langner v Germany* judgment discussed above,⁹⁵ the Court found that the applicant’s lack of ethical motives was in itself⁹⁶ a reason to ‘distinguish’ the case from the whistleblower protection framework established under the *Guja* judgment, and to find no violation of Article 10.⁹⁷ For the Court in this instance, the purity of motives served almost as a definitional characteristic of whistleblowing. While the Court was correct to ultimately find no violation of Article 10 as the applicant in this case did not satisfy multiple of the relevant criteria,⁹⁸ the fact that his motives were in themselves a reason to distinguish this case from *Guja* creates confusion as to the exact significance of motives to the outcome of the case.

Scholars have shared concerns against relying too heavily on whistleblowers’ motives as a prerequisite for protection under free speech.⁹⁹ EU Directive 2019/1937 also emphatically stated that ‘the motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection’.¹⁰⁰ In a similar vein, the explanatory memorandum accompanying draft recommendations to CoE States on the protection of whistleblowers noted that ‘[t]he juxtaposition of other subjective criteria relating to the whistleblower’s motivation [...] is dangerous as it is unpredictable with regard to its application by the courts’.¹⁰¹ The response to this concern in the

90. *ibid* 30.

91. *ibid* 32.

92. *Guja v Moldova* (n 6) para 77.

93. *ibid*. See also *Kudeshkina v Russia* (n 75) para 95.

94. See *Sosinowska v Poland* App no 10247/09 (ECHR, 18 October 2011) particularly at paras 61 and 79, and for a similar approach, *Aurelian Oprea v Romania* App No 12138/08 (ECHR, 19 January 2016) para 71.

95. *Langner v Germany* (n 86).

96. Namely, independent of other reasons.

97. *Langner v Germany* (n 86) para 47.

98. For instance, the applicant’s claims were unfounded and he had failed to carry out an investigation into his allegations, *ibid* para 48.

99. Jean-Philippe Foegle, ‘Luxleaks and the Good Faith Whistleblower’ (*Verfassungsblog*, 15 November 2017) <<https://verfassungsblog.de/luxleaks-and-the-good-faith-whistleblower>> accessed on 3 July 2021.

100. EU Directive 2019/1937 (n 2) para 32.

101. Report by Mr Sylvain Wasserman (n 3) para 57.

draft resolution, however, is not to discard this as a criterion altogether. It simply creates a presumption that the whistleblower acted in good faith and places the burden on the employer (or the respondent government before the ECtHR) to prove this was not the case. This does not significantly depart from previous CoE resolutions on the protection of whistleblowers.¹⁰²

How, then, can we assess recourse to the speaker's motives from the perspective of free speech? There is theoretical disagreement as to whether motives, or the speaker's intent, should affect the protection they receive under freedom of expression.¹⁰³ The practice of the Court in its broader free speech case law does not provide much clarity either on whether motives are important when determining if a speaker enjoys protection under Article 10 ECHR. As Ó Fathaigh and Voorhoof explain,¹⁰⁴ in some cases, the Court assigns no significance to a speaker's motives.¹⁰⁵ Conversely, the Court has examined the speaker's intent in many other cases relating to artistic expression¹⁰⁶ and hate speech.¹⁰⁷

In order to determine whether this criterion is principled, it is worthwhile to examine the Court's rationale in introducing it. For this criterion, the Court relied on *Haseldine v UK*,¹⁰⁸ an admissibility decision of the now defunct European Commission on Human Rights (Commission). In *Haseldine*, the applicant wrote a letter to a newspaper criticising the Prime Minister over her handling of a diplomatic crisis. The Commission held that Haseldine's eventual dismissal did not violate Article 10 ECHR, partly because he 'was motivated by a concern to publicise his professional grievances rather than a desire to *express his opinions*'.¹⁰⁹ The Commission also noted 'the incompatibility between his professional loyalty and the *personal opinions* which he wished to express'.¹¹⁰

It is questionable whether this is an apposite case from which the Court should draw inspiration when assessing whistleblowers' freedom of expression. The position of a worker alerting the public to misconduct is different to that of a worker publicly expressing personal opinions on government policy. Whistleblowers are a distinct category of speakers. As this article has determined, their inclusion in the speech-protective framework of Article 10 ECHR is premised on the audience interest in their speech. The ECtHR does not protect whistleblowers so that they can publicly express their opinion on government policy, but rather for them to share vital information that informs the democratic process. Thus, a criterion stemming from a case where the individual interests of

102. See for instance Council of Europe Parliamentary Assembly (n 64) para 6.3.

103. For instance, Sunstein has argued that 'the highest level of protection goes to political speech, which is speech that is both *intended* and received as a contribution to public deliberation about some issue' in Cass R. Sunstein, *Democracy and the Problem of Free Speech* (Free Press 1993) 130-131 (emphasis added). Conversely, Alexander argues against considering the author's intentions arguing that '[w]hatever the author intends to communicate by her speech, it is always possible and indeed highly likely that the ideas the audience receives will be different' in Larry Alexander (n 25).

104. Ronan Ó Fathaigh and Dirk Voorhoof, 'Conviction for performance-art protest at war memorial did not violate Article 10' (*Strasbourgobservers*, 19 March 2018) <<https://strasbourgobservers.com/2018/03/19/conviction-for-performance-art-protest-at-war-memorial-did-not-violate-article-10>> accessed on 3 July 2021.

105. *ibid* citing *Sinkova v Ukraine* App No 39496/11 (ECHR, 27 February 2018).

106. See for instance *Murat Vural v Turkey* App No 9540/07 (ECHR, 21 October 2014) para 54 and *Tatár and Fáber v Hungary* App Nos 26005/08, 26160/08 (ECHR, 12 June 2012) para 39.

107. See for instance, *Perinçek v Switzerland* App. No. 27510/08 (ECHR, 15 October 2015) para 232. Conversely, in *Nix v Germany* App No 5285/16 (ECHR, 13 March 2018) the fact that the applicant did not intend to propagate hate with the impugned speech, was found to be irrelevant.

108. *Haseldine v United Kingdom* App No 18957/92 (EComHR, 13 May 1992).

109. *ibid* (emphasis added).

110. *ibid* (emphasis added).

the speaker were central (their ability to share their personal opinions on government conduct) does not comfortably translate to speakers who draw Article 10 ECHR protection in a ‘parasitic’ manner from the audience.

By examining whistleblowers’ motives, the Court moves away from an assessment of the ‘quality’ of their communication and instead examines the attributes of the speaker. This criterion is of no consequence to the public receiving the information. If the whistleblower has already satisfied the criteria that their information is in the public interest and they have taken steps to confirm its veracity, their motive, as an additional factor in proportionality, does little to improve the quality of the message that reaches the audience. Once again, the Court fails to draw a distinction between whistleblowing and other types of speech where the audience interest is not the main justification for offering Article 10 ECHR protection. Where speech not amounting to whistleblowing is concerned, and the interests of the speaker are solely to be balanced against the interests of the institution, the speaker’s duty of loyalty towards her organisation can credibly be used as a justification for the Court to examine her motives.

4.3 THE USE OF INTERNAL MECHANISMS TO RAISE CONCERN AS A PREREQUISITE FOR WHISTLEBLOWER PROTECTION

The next criterion requires the whistleblower to proceed to public disclosures only as a means of last resort. The expectation is that the whistleblower will strive to bring attention to any alleged misconduct by approaching internal mechanisms within their institution or by approaching professional bodies or regulators before proceeding with a more public disclosure of information.¹¹¹

This requirement may raise concerns. Sagar suggests that internal reporting may result in senior officials ignoring or suppressing a whistleblower’s complaint ‘in order to hide their complicity or to avoid a scandal’.¹¹² The lack of external support and public attention also means that the whistleblower can be exposed to retaliatory measures, while also giving wrongdoers ‘the opportunity to destroy incriminating evidence’.¹¹³ These concerns are acknowledged in CoE recommendations to Member States on whistleblowing. In its 2010 resolution on the protection of whistleblowers, the Parliamentary Assembly of the CoE stressed that:

where internal channels either do not exist, have not functioned properly or could reasonably be expected not to function properly given the nature of the problem raised by the whistle-blower, external whistle-blowing, including through the media, should likewise be protected.¹¹⁴

Apart from the aforementioned concerns that this additional requirement raises for the whistleblower, is it defensible from the perspective of freedom expression?

By adopting this criterion, the Court establishes a prescribed pathway the speaker must follow in order to benefit from free speech protection. In assessing how this duty applies in specific whistleblowing cases, the ECtHR has closely followed recommendations by the Parliamentary Assembly

111. The Court refers to *Morissens v Belgium* (n 70) to generate this criterion and considers it part of civil servants’ ‘duty of moderation’ towards their employer.

112. Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press 2013) 133.

113. *ibid.*

114. Council of Europe Parliamentary Assembly (n 64) 6.2.3.

of the CoE. Where effective internal avenues for raising concern are not available, the Court has confirmed that a public disclosure will be justified and retaliation against the whistleblower will violate Article 10.¹¹⁵ Similarly, the Court considers that whistleblowers have fulfilled this requirement if they informed their superiors before making the information public, but no action was taken to address their concerns.¹¹⁶ Where the applicant failed to make use of existing and effective mechanisms, this will work against them in relation to the protection they receive under Article 10 ECHR.¹¹⁷

Prescribing a specific avenue for the speaker to share information appears to be a novel way for the Court to interpret Article 10 ECHR. One way to explain this approach is to consider that by introducing this criterion, the Court is not suppressing the substance or the content of the speech, but merely the ‘time, manner and place’ in which it is communicated. ‘Time, manner and place’ restrictions are commonplace in the context of free speech, particularly with respect to demonstrations and protest, where the Court may find that the applicant did not have the right to demonstrate or protest in a specific area at a specific time under Article 10 and 11 ECHR.¹¹⁸ Such limitations can be justified under free speech principles as long as ‘they leave ample alternative channels for communication of the ideas and information’.¹¹⁹ The civil servant’s worker-based duties towards their employer thus translate into a duty to first use more ‘discreet means for remedying wrongdoing’¹²⁰ before informing the public.

Even so, overly focusing on this duty would be problematic. The Court itself has accepted that whistleblowing is ‘an action warranting special protection under Article 10 of the Convention, in which an employee reports a criminal offence in order to draw attention to alleged unlawful conduct of the employer’.¹²¹ This element of drawing public attention to wrongdoing is a particularly important dimension of whistleblowing that a requirement to use internal mechanisms may suppress. Adopting a more pragmatic approach however, the Court is simply giving the public authority the opportunity to address misconduct and to rectify wrongdoing. As long as the Court continues its flexible approach to this criterion, its inclusion does not undermine the framework from the perspective of freedom of expression. Once again, however, the Court should communicate in its case law that any claims against the whistleblower for failing to use other procedures should be thoroughly scrutinised and balanced against the public interest in the disclosure. The Court could also benefit by setting clearer standards for States to follow as to when internal mechanisms are considered effective.¹²²

115. See *Guja v Moldova* (n 6) paras 80-81.

116. *Matúz v Hungary* (n 50) para 47.

117. See for instance *Soares v. Portugal* (n 60) paras 47-50.

118. ‘Time, manner and place’ restrictions are a notable aspect of the US Supreme Court’s First Amendment jurisprudence. See indicatively *Madsen v Women’s Health Center, Inc.*, 512 U.S. 753 (1994). For an example in the ECtHR, see *Sinkova v Ukraine* (n 99). The Court found no violation of Article 10 ECHR for a protester who staged an environmental protest at the tomb of the Unknown Soldier and was given a suspended sentence. This was because ‘the applicant was not convicted for expressing the views that she did [...]’. Her conviction was a narrow one in respect of particular conduct in a particular place’ para 108.

119. *Barendt* (n 21) 281.

120. *Guja v. Moldova* (n 6) para 77.

121. *Langner v. Germany* (n 86) para 47.

122. The recent EU framework for whistleblower protection under directive 2019/1937 establishes much clearer standards for States to adopt from which the ECtHR could draw inspiration. See EU Directive 2019/1937 (n 2) Article 15(1).

4.4 THE SEVERITY OF THE PENALTY

The final criterion on which the Court focuses is the severity of the penalty imposed on the whistleblower. The Court recognised from its early whistleblowing case law that dismissal from employment for blowing the whistle on misconduct ‘undoubtedly is a very harsh measure’,¹²³ and ‘the heaviest sanction possible under labour law’.¹²⁴ However, in its assessment of the severity of the penalty, the Court does not solely focus on the negative impact the sanction will have on the applicant’s career or her personal interests. The Court has also considered that harsh penalties may discourage others from reporting misconduct.¹²⁵ Thus, the Court also examines the ‘chilling effect’ of a harsh penalty and underscores that a severe sanction may dissuade other potential whistleblowers from speaking up. Such harsh penalties intending to make an example of a whistleblower ‘[work] to the detriment of society as a whole’.¹²⁶ This criterion is, therefore, informed by a concern that future whistleblowers will choose to stay silent, thus depriving the audience from important information ‘on matters of general interest’.¹²⁷ On this basis, even though this criterion does not appear solely in whistleblowing cases,¹²⁸ its inclusion in the framework is very much in line with the theoretical justifications that underpin the Court’s recognition of whistleblowing as speech.

5. BOLSTERING THE PUBLIC WATCHDOG FUNCTION OF THE WHISTLEBLOWER

The sections above provide an overview of the tension at the core of the Court’s approach to whistleblowing, where the Court must weigh the quasi-public watchdog function of whistleblowers against their duties and responsibilities as civil servants. The Court gives primacy to the audience interest in the speech over the whistleblower’s duty of confidence when it assesses the harm caused to the public institution by the disclosure. Conversely, the duties of loyalty and moderation will in some cases be considered more important, for instance where motives or the use of internal mechanisms are concerned.

This highlights a lack of clarity as to how the Court perceives the whistleblower as a speaker. While suggesting that whistleblowing engages Article 10 ECHR based on whistleblowers’ contribution to the audience interest in the speech, the Court in the application of certain criteria seems to place too much emphasis on criteria that are incompatible with this purpose. The judgment in *Pasko v Russia* is a particularly egregious example of this.¹²⁹ The applicant, a Russian naval officer, was caught carrying classified information while preparing to leave the country on an official trip to Japan. He was allegedly planning to share this information with journalists. The information evidenced serious environmental pollution caused by the Russian Pacific fleet in the region. The applicant was ultimately imprisoned under espionage laws. The Court in its assessment of the case forwent any examination of the public interest in the information the applicant was attempting to communicate and instead focused solely on the fact that ‘he was bound by an obligation of

123. *Guja v Moldova* (n 6) para 95.

124. *Heinisch v Germany* (n 50) para 91.

125. *ibid.*

126. *ibid.*

127. *Matúz v Hungary* (n 50) para 50.

128. See indicatively *Baka v Hungary* (n 71) para 160 and *Cumpănă and Mazăre v Romania* (n 69) para 114.

129. *Pasko v Russia* App No 69519/01 (ECHR, 22 October 2009).

discretion in relation to anything concerning the performance of his duties'.¹³⁰ The Court concluded that due to his position and the nature of the information (relating to national security), the respondent State had not overstepped its wide margin of appreciation by imprisoning the applicant.¹³¹ This is an extreme example where the worker-based duties of the applicant trumped any consideration of the public interest in his intended disclosure.

While implicitly recognising that whistleblowers act as quasi-public watchdogs, it is also problematic that Court has not explicitly assigned public or social watchdog status to whistleblowers. While traditionally the term was only used in reference to journalists and the press, the Court extended public watchdog status to encompass NGOs,¹³² and 'academic researchers [...] authors of literature on matters of public concern, [...] bloggers and popular users of the social media'.¹³³ All these speakers deliver information in the public interest and the Court recognises the value in assessing any restrictions against their speech more strictly. Assigning a public watchdog function to a speaker produces legal effects in that it is used as a basis for the Court to carry out a stricter scrutiny of an interference with their free speech,¹³⁴ and to reinforce the importance of the audience's interest in accessing the information they share.

On this basis, there is added value in bolstering the public watchdog status of civil servant whistleblowers, primarily because it would allow the Court to prioritise this watchdog function over their duties as workers. The existing approach assumes that, in principle, these two competing concerns carry equal force, and it is for the Court to determine on an *ad hoc* basis which one will prevail. This is a problematic starting point that may result in placing emphasis on matters that are extraneous to, or even contravene, the fundamental principle behind whistleblowing as a form of expression, namely the audience interest in the speech. This principle requires the Court to ensure the circulation of information in the public interest. Suggesting that duties of loyalty to one's institution constitute an acceptable justification to limit the audience's access to public interest information on wrongdoing undermines the coherence of the framework. That is not to say that the public watchdog status of the speaker should result in an absolutist approach which would bar any restrictions to their speech or preclude any countervailing considerations from being taken into account in proportionality. It simply suggests that any factors the Court employs in its proportionality assessment should be relevant to the overall principle underlying the protections provided to the speech in question.

It is important to acknowledge, however, that the public watchdog role is a double-edged sword. On the one hand, it offers more protection to whistleblowers. At the same time, it requires them to assume greater duties and responsibilities in their exercise of freedom of speech. This may give rise to certain concerns that are addressed in the following section.

130. *ibid* para 86.

131. *ibid* para 87.

132. *Magyar Helsinki Bizottság v Hungary* App No 18030/11 (ECHR, 8 November 2016) para 164.

133. *ibid* para 168.

134. *Bladet Tromsø and Stensaas v Norway* (n 70) para 59. For an overview of the role of various public watchdogs see Dirk Voorhoof and Hannes Cannie, 'Freedom of Expression and Information in Democratic Society: The Added but Fragile Value of the European Convention on Human Rights' (2010) 72 *International Communication Gazette* 407.

6. ADDRESSING POTENTIAL OBJECTIONS

First, the approach to proportionality in whistleblowing cases that the article has supported may be criticised for taking whistleblower protection too far, to the detriment of the employer. By depriving the public authority of the opportunity to challenge the motives of the civil servant whistleblower, or by not allowing the Court to weigh the damage caused to the public authority by the disclosure, the public authority finds itself at a disadvantage as its interests under this framework do not prominently feature in proportionality. Ultimately, under this argument, the proposed approach could encourage careless or vexatious disclosures of official information.

It would be incorrect, however, to argue that the framework for whistleblower protection the article endorses altogether discards the interests of the public institution. These interests are still protected from the vexatious leaker on the basis that first, the disclosure must inform the public interest and second, the whistleblower has a duty to take reasonable steps to confirm the veracity of the information. These criteria benefit the audience interest in the speech while simultaneously ensuring that vexatious disclosures that do not satisfy these criteria are not protected. This indirectly also protects the interests of the employing institution that has not engaged in wrongdoing and is the victim of a vexatious information disclosure. Particularly the requirement for the disclosure to be in the public interest allows the authority to argue that ultimately, the interest in non-disclosure should prevail.

However, where an institution has been involved in misconduct, it is counter-intuitive and unprincipled to consider the whistleblowers' duty of loyalty to the institution as a reason to justify restrictions to their speech after making information on this misconduct public.¹³⁵ Additionally, organisations that provide robust internal avenues for raising concerns and address wrongdoings could make a strong case that external whistleblowing was not warranted in the specific instance. Finally, considering the subordinate position of the worker in relation to their employer,¹³⁶ and the interest in protecting speech that is conducive to democratic deliberation and accountability, the proposed framework represents a nuanced way to ensure that neither the whistleblower nor their employer are disadvantaged.

Conversely, another concern may be that the proposed approach is too onerous for whistleblowers and thus under-privileges them. Bolstering the 'public watchdog' status of whistleblowers may result in assigning them excessive responsibilities and expectations. Requiring a civil servant who may coincidentally come across information on wrongdoing to assume a quasi-journalistic and investigative role may be unrealistic and expose them to further detriment if they get things wrong. Whistleblowers may also be ill-equipped to determine whether the information they are sharing is indeed in the public interest.

The practice of the Court, however, already takes this concern into account. While the Court relied on its journalism case law to develop these criteria, it does not hold journalists and whistleblowers to the same standard. The whistleblower's conduct is assessed based on what was reasonable under the circumstances. The Court does not apply an *ex post facto* assessment to determine whether the whistleblower took reasonable steps to confirm the accuracy of the disclosed information. As the Court

135. It is worth noting the approach of Woods V-C in the English judgment in *Gartside v Outram* (1857) 26 Ch 113 at 114 where it was held that 'there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part'.

136. See Davies and Freeland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens Hamlyn Lecture Series 1983) 18.

stresses, it will carry out this assessment ‘in the light of the situation at the time that the statements [by the whistleblower] were made, rather than with the benefit of hindsight’.¹³⁷

The ECtHR further elaborated on this point in its recent judgment in *Gawlik v Liechtenstein*.¹³⁸ The applicant in this case was a doctor who was dismissed after making serious allegations against his colleagues relating to patient care that were ultimately found to be incorrect. The Court stressed that Article 10 would still protect the whistleblower ‘under certain circumstances where the information in question subsequently proved wrong or could not be proven correct’.¹³⁹ This approach ensures that a good faith whistleblower will not be excluded from Article 10 protection even if they get things wrong. In reaching this conclusion, the Court also cited Recommendation CM/Rec(2014) 7 on the protection of whistleblowers,¹⁴⁰ in which the Committee of Ministers noted that ‘protection should not be lost solely on the basis that the individual making the report or disclosure was mistaken as to its import’.¹⁴¹ However, in *Gawlik*, the applicant’s failure to investigate the veracity of his allegations was found to be egregious, on the basis that a rudimentary assessment of patients’ paper files to which he had access would have immediately proven that his concerns were wholly unfounded. This meant that his allegations were made hastily and irresponsibly. Ultimately, and combined with the seriousness of his allegations, the Court found no violation of Article 10 in this case.¹⁴²

Therefore, the Court is sensitive to the position of whistleblowers and sets reasonable expectations for them to fulfil, based on the materials to which they had access and the conclusions they could infer at the time of making the allegations.

7. CONCLUSION

In its Article 10 ECHR case law, the Court has recognised that unauthorised disclosures of information on government wrongdoing are a vital component of government transparency and accountability. Free speech protection in this context is derived from the audience interest in accessing the information the whistleblower discloses. This has important consequences for proportionality. While the Court implicitly recognises that whistleblowers are akin to public watchdogs in some respects, it still places considerable weight on their duties as workers. The article maintains that placing greater emphasis on the watchdog function of whistleblowing better reflects the underlying purpose of protecting whistleblowers’ free speech. This will allow the Court to offer a more principled and coherent approach to public interest whistleblowing.

As a final note, this article has focused its critique on whistleblowing in the public sector by viewing whistleblowers as an added mechanism for the public accountability of government. In its *Heinisch*¹⁴³ judgment, however, the ECtHR reiterated that Article 10 ECHR extends to employment relationships governed by private law.¹⁴⁴ This judgment suggested that the Court would also

137. *Rungainis v Latvia* (n 64) para 57.

138. *Gawlik v Liechtenstein* App No 23922/19 (ECHR, 16 February 2021).

139. *ibid* para 75.

140. Adopted by the Committee of Ministers on 30 April 2014.

141. *ibid* principle No. 22.

142. *Gawlik v Liechtenstein* (n 138) para 78.

143. *Heinisch v Germany* (n 50). Even in this judgment, however, the Court placed emphasis on the fact that the organisation in question was in its majority state-owned when determining the public interest in the disclosure at para 71.

144. *ibid* para 44.

apply its criteria to private sector whistleblowers.¹⁴⁵ Would the article's proposed framework apply in this context? While the underlying justification for including whistleblowing in the scope of Article 10 remains the same, further research may be required to investigate whether the differences between States' negative and positive obligations in relation to the weighing of competing interests in proportionality could affect the proposed framework.¹⁴⁶ Additionally, it would be important to more carefully determine how the requirement for accountability and transparency of government (which was the centrepiece of the Court's analysis in *Guja* and other cases relating to civil servants),¹⁴⁷ translates to wholly private institutions. Even then, it would be difficult to justify why the whistleblower's motive would be a relevant consideration where misconduct in a private institution has occurred and its disclosure is in the public interest, or why the organisation's commercial interests should outweigh the public interest in the reporting of wrongdoing.

Acknowledgement

The author is grateful to the anonymous reviewers, and to Prof. Helen Fenwick, Dr Jane Rooney, Dr Mathilde Pavis, Eliza Bechtold and Dr Philippa Collins for their comments on previous drafts. The usual disclaimers apply.


Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship and/or publication of this article.

ORCID iD

Dimitrios Kagiaros  <https://orcid.org/0000-0001-7651-3513>

145. *ibid* para 64. See also Dirk Voorhoof and Patrick Humblet, 'The Right to Freedom of Expression in the Workplace under Article 10 ECHR' in Dorssemont, Lörcher and Schömann (eds.), *The European Convention of Human Rights and the Employment Relation* (Hart Publishing 2013) especially section 2.1.

146. See Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia 2017) 233-239.

147. *Guja v Moldova* (n 6) para 74, *Matiz v Hungary* (n 50).